Supreme Court, U.S.
FILED
AUG 17 2010
OFFICE OF THE CLERK

No. 09-1535

In the Supreme Court of the United States

LANA PEREZ AND ELENA LEFFLER,
PETITIONERS

v.

SAKS FIFTH AVENUE, INC.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Should the Court defer action on this petition pending the Court's decision on the proper standard for "cat's paw" liability in *Staub v. Proctor Hospital*, No. 09-400, even though (i) Petitioners never challenged the "mere conduit" standard below and argued for that standard in the Eleventh Circuit, and (ii) the Eleventh Circuit decision would not change if this Court sets a different standard in *Staub*?

CORPORATE DISCLOSURE STATEMENT

As required by Supreme Court Rule 29 6, Respondent Saks Fifth Avenue, Inc states as follows

1. Saks Fifth Avenue, Inc is a nongovernmental corporation.

2 Saks Fifth Avenue, Inc 's parent corporation is Saks & Company

3 No publicly-held corporation owns 10% or more of Saks Fifth Avenue, Inc 's stock However, Saks Fifth Avenue, Inc is an indirect subsidiary of Saks Incorporated, a publicly traded corporation Based on publicly available documents, BlackRock, Inc. and its affiliates own more than 10% of Saks Incorporated's stock

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BRIEF IN OPPOSITION

Respondent Saks Fifth Avenue, Inc. (Saks) respectfully submits this opposition to petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Petitioners now dispute for the first time the appropriate standard to hold an employer liable based on unlawful intent of someone who influenced, but did not make, an ultimate employment decision ("cat's paw" liability). Petitioners never questioned the standard for cat's paw liability in the district court, and, in fact, argued that the district court's

standard was the appropriate one for the Eleventh Circuit to apply.

The precise standard for cat's paw liability never became an issue in the district court. The court did not analyze what the appropriate standard was because it found that Saks would not be liable under any standard, as there was no evidence of any influence by a biased subordinate over the decisionmaker. The Eleventh Circuit affirmed this decision.

Thus, this Court should deny the petition because Petitioners accepted – and even endorsed – the "mere conduit" standard in the district court and Eleventh Circuit. Moreover, there is no reason to defer action on the petition pending the Court's decision in *Staub v. Proctor Hospital*, No. 09-400, as the decision below would be the same regardless of what cat's paw liability standard the Court adopts in *Staub*.

STATEMENT

Saks terminated the employment of Petitioners, who had been salespeople in one of Saks's Florida stores, after an internal investigation revealed that they were giving unauthorized discounts to customers to increase their sales and commissions, and they were approving improper merchandise returns. Petitioners claimed their employment was terminated because of age discrimination and retaliation, and a trial was held on this issue in the United States District Court for the Southern District of Florida. After the jury returned a verdict for Petitioners, the district court granted Saks's motion for judgment as a matter of law. (Pet. App. 3a-24a) The Court of Appeals affirmed the district court's "well-reasoned order" in a brief per curiam order. (Pet. App. 2a)

I. Discussion of Cat's Paw Liability Standard in the District Court

Petitioners never questioned the "mere conduit" standard for cat's paw liability in any of the district court proceedings. The district court judge instructed the jury as follows:

> If a person harboring age animus succeeds in influencing the final decision-maker into taking the challenged adverse employment action based on false information or information which would otherwise not be an adequate basis for the adverse employment action, then the adverse employment action is attributable to the person harboring age animus, even though he or she did not make the final decision. In such a case, the final decision-maker is a *mere conduit* for the discriminatory bias of the person harboring age animus.

(emphasis added). Neither Petitioners nor Saks objected to this instruction. In fact, in Petitioners' proposed jury instructions, they requested that the district court instruct the jury that Saks could be liable where "the ultimate decision-maker is a mere conduit for the harasser's discriminatory bias."

Following the jury verdict, Saks made a renewed motion for judgment as a matter of law. In Plaintiffs' Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law, Petitioners accepted the "mere conduit" standard, citing *Tucker v. Housing Authority*, 229 F. App'x 820, 823 (11th Cir. 2007), for the proposition that the cat's paw theory requires a showing that "the recommender is using the decision-maker as a mere conduit, or 'cat's paw' to give effect to the recommender's discriminatory animus."[1]

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[1] The only argument Petitioners made concerning the cat's paw standard in the district court concerned whether a decisionmaker (continued)

The district court granted Saks's renewed motion for judgment as a matter of law. The court analyzed at length Petitioners' argument that although there was no evidence that the individual who actually terminated Petitioners (Margaret Phelan) harbored discriminatory animus or had a motive to retaliate, she was impermissibly influenced by two other people who held age-based animus or a motive to retaliate. The district court found that there was insufficient evidence for a reasonable juror to conclude that one of these two individuals (Gloria Salerno) harbored animus or a retaliatory motive, which made the sole question whether the other individual (Raymond Terbecki) influenced Phelan's decision to terminate Petitioners.

The district court concluded that Phelan's decision to terminate Petitioners was based solely on an independent investigation conducted by the store's Asset Protection Department, which Terbecki did not participate in or initiate. (Pet. App. 14a) The district court found:

> Terbecki never had contact with Phelan concerning the Asset Protection Department's investigation of Plaintiffs or the suspension and termination of Plaintiffs. Nor did Terbecki participate in, or initiate, the Asset Protection's investigation. No evidence to the contrary was presented. Without having participated in the Asset Protection investigation and in the absence of any contact with Phelan, *Terbecki could not have influenced Phelan's ultimate decision to terminate Plaintiffs* or skewed the results of the Asset Protection investigation to influence Phelan's decision. *There is no evidence*

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must conduct an independent evaluation of the termination decision to escape being a mere conduit for another person's discriminatory animus.

> *in the record that Terbecki used any other means of influencing Phelan's decision to terminate Plaintiffs*

(Pet. App. 14a-15a) (internal citations omitted) In fact, the district court repeatedly emphasized that there was no evidence that Terbecki asserted any influence over Phelan's decision to terminate Petitioners. (Pet. App. 14a, 15a, 22a, 23a)

Having found that there was no evidence that Terbecki had any influence on the decision to terminate Petitioners, the district court did not analyze the standard for how much influence someone with discriminatory animus must exert over a decisionmaker to find that the decisionmaker was acting as the "cat's paw" for the discriminating actor. The district court noted that the standard is whether Phelan was a "mere conduit for the discriminatory bias or retaliatory motives" of Terbecki, but the court did not attribute any practical import to the "mere conduit" standard, as it found Terbecki did not influence Phelan's decision in *any* way at all.[2]

II. Discussion of Cat's Paw Liability Standard in the Eleventh Circuit

On appeal to the Eleventh Circuit, Petitioners did not dispute the "mere conduit" standard. To the contrary, in re-

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[2] With respect to Salerno, the district court explained at great length why "no reasonable juror could conclude that Salerno harbored age animus towards Plaintiffs or that Plaintiffs' suspension and termination was retaliatory." (Pet. App. 13a) The district court concluded that, even assuming *arguendo* that Salerno maintained discriminatory bias against Plaintiffs, there was an "absence of evidence substantiating an attempt by Salerno to convince Phelan to take adverse employment action against Plaintiffs that relies on more than unsupported speculation . . . ." (Pet. App. 18a)

sponse to Saks's argument for a more restrictive cat's paw liability standard, Petitioners strongly objected, arguing, "Saks did not object to this instruction [on the mere conduit standard] and it is the law of the case." Petitioners asserted that the Eleventh Circuit should apply the "mere conduit" standard for assessing cat's paw liability, noting in their Eleventh Circuit brief that one is a cat's paw if he is "a conduit for imputation of discriminatory animus." In the many pages Petitioners devoted in their Eleventh Circuit briefs to the subject of cat's paw liability, not once do they dispute the use of the "mere conduit" standard.

The Eleventh Circuit affirmed the district court's decision in a one paragraph per curiam decision in which it explained that it agreed with the district judge's "well-reasoned order." (Pet. App. 2a) Although the Eleventh Circuit quoted the "mere conduit" language included in the district court decision, there is no indication that the Eleventh Circuit relied on this standard in reaching its decision, or that it was avoiding decision on the supposed separate issue of whether Terbecki influenced Phelan's decision at all.

After the Eleventh Circuit issued its decision, this Court granted certiorari in *Staub*, which deals with the proper standard for cat's paw liability. Following the grant of certiorari in *Staub*, Petitioners raised for the first time in their petition for a writ of certiorari the issue of whether the lower courts used the proper standard for cat's paw liability in this case.

REASONS FOR DENYING THE PETITION

This Court should deny the petition and not defer action because (i) Petitioners are precluded from raising the issue of the cat's paw liability standard, as they never challenged the "mere conduit" standard below, and are estopped from arguing against the very standard that they advocated for in the Eleventh Circuit, and (ii) even if this Court sets a different

standard in *Staub*, it would not change the decision in this case.

I. Petitioners Are Precluded From Seeking Review of the Cat's Paw Liability Standard

Petitioners are barred from seeking review by this Court of the appropriate standard for cat's paw liability. Petitioners (i) did not object to the district court's jury instruction providing the "mere conduit" standard, and in fact requested the jury be instructed on the "mere conduit" standard, (ii) did not object to the "mere conduit" standard in opposing Saks's renewed motion for judgment as a matter of law, and (iii) did not object to the "mere conduit" standard in the Eleventh Circuit, instead arguing that this was the appropriate standard the Eleventh Circuit should adopt.

Petitioners never argued against the "mere conduit" standard in the district court or the Eleventh Circuit. *See Rita v. United States*, 551 U.S. 338, 360 (2007) (issues not raised below will not be considered by the Court); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (a question that "was not raised in the Court of Appeals . . . is not properly before us").

Not only did Petitioners fail to argue for a different standard for cat's paw liability in the courts below, the district court and Eleventh Circuit adopted the very standard that Petitioners advocated. Petitioners should not be allowed to accept and argue for the "mere conduit" standard below, only to switch their position before the Supreme Court.

Petitioners should be estopped from "playing fast and loose with the courts" and assuming a contrary position "simply because [their] interests have changed." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotations and citations omitted). Judicial estoppel prevents parties from doing precisely what Petitioners seek to do here by

stopping parties from "relying on a contradictory argument" to prevail in a different phase of litigation. *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000).

II. The Decision Below Would Not Change Under a Different Standard for Cat's Paw Liability

Petitioners erroneously argue that "[t]his Court's decision in *Staub* is likely to affect the disposition of the petition in the instant case." (Pet. at 8) To the contrary, reexamining this case under any standard this Court may set forth in *Staub* would lead to the same result. The question presented in both the petition and in *Staub* asks in what circumstances there should be liability where there was some influence on the decisionmaker. The petition for certiorari in *Staub* discussed various standards adopted by courts, including the functional decisionmaker standard, the causation standard, and the influence standard. The Eleventh Circuit decision would be the same regardless of which standard is used.

The Eleventh Circuit affirmed the "well-reasoned order" of the district court in its entirety after having "carefully reviewed the record and the court's order." (Pet. App. 2a) The Eleventh Circuit decision would not change under a different standard for cat's paw liability because the district court's decision – which it affirmed – found that there was no influence over the decisionmaker by a biased subordinate. In fact, any distinction between the "mere conduit" standard and a broader "influence" standard was immaterial to the district court's decision because the court found that even under the lowest possible threshold, Petitioners still would not prevail. Contrary to Petitioners' assertion, the district court did not grant judgment as a matter of law on two separate grounds – under the "mere conduit" standard and under a broader influence standard. Although the district court accepted the "mere conduit" standard – without any analysis, and without objection from Petitioners – the court explained that in this case, a reasonable juror could not have found that Terbecki exerted any influence over the decisionmaker.

Indeed, Petitioners acknowledge in their petition, "The central dispute at trial was whether Phelan had been influenced (and if so, how much) by other Saks officials . . . ." (Pet. at 3) The district court plainly never reached the question of "how much" influence was necessary for cat's paw liability, which forms the crux of the petition. The district court was able to conclude its inquiry with the first part of this question, finding that there was no influence at all. Thus, the Eleventh Circuit decision would not change because there was *no* influence over the decisionmaker in this case.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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AUGUST 2010